FILED
DEC 20 1974
MICHAEL RODAK, JR., CLERK

NO. 74-1606

In the

Supreme Court of the United States

October Term, 1974

[illegible] SCHOOL DISTRICT NO. 1, BOARD OF EDUCATION OF [illegible] JOINT SCHOOL DISTRICT NO. 1, [illegible], ROBERT VACA, JEAN [illegible], and [illegible] PLAMANN VICTOR [illegible], individually and as [illegible] Board of Education of Menasha Joint School District No. 1, and MARVIN ONEIL ROBERT [illegible], individually and as administrators [illegible] Joint School District No. 1,

Petitioners,

v.

[illegible] ASSOCIATION and MICHAEL [illegible], JEAN MARIE OLSON, THOMAS WADEAU, [illegible] AUDREY LIGHTY and DONALD HAMMOND,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin

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BRIEF FOR RESPONDENTS

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and **MARVIN OBRY, ROBERT KOHLS and GENE RIEDL,** individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

vs.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

On Writ of Certiorari to the Supreme Court
of the State of Wisconsin

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

The individual respondents are teachers who brought the underlying action on behalf of themselves and all other teachers in the Hortonville Joint School District. The respondent Hortonville Education Association is their union

and bargaining agent. The members of the petitioner School Board, under Wisconsin law, are the persons responsible for engaging in collective bargaining with the teachers. They assumed this responsibility and did not delegate it to anyone else.

A collective bargaining agreement had last been reached in 1972 for the 1972-1973 school year. Commencing in the spring of 1973, the teachers attempted, through their association, to reach a collective bargaining agreement for the 1973-1974 school year. None was reached and the teachers commenced working during the 1973-1974 school year without a new collective bargaining agreement while continuing negotiations. As the year passed, the negotiations expanded to cover the 1974-1975 school year as well.

The negotiations did not proceed smoothly. The parties were often hostile and bitter towards each other. The teachers believe and have publicly stated that the failure to reach agreement was due to a lack of good faith bargaining by the School Board and further that the School Board was attempting to destroy their relatively young union. (A. 123) The Board, on the other hand, charges that the failure to reach agreement was due to the intransigence of the union, and that the Board had made reasonable offers which were rejected by the respondents. (A. 112-114) Thus, a hostile atmosphere existed between the parties as a result of intensive and unsuccessful labor negotiations.

Under Wisconsin law, §118.22(2), Wis. Stats., school boards must decide on or before March 15 of each year whether to renew or to refuse to renew individual contracts with teachers. Acting pursuant to this statute, the School Board in the spring of 1974, offered all of the teachers contracts for the 1974-1975 school year. (A. 190)

Therefore, by March 15, 1974, the teachers were staring into a second school year without a new collective bargaining agreement and with continued reliance upon the old 1972-1973 collective bargaining agreement.

In response to this situation and their beliefs about the Board's motives, the teachers commenced a strike on March 18, 1974. (A. 173) The members of the Board issued a public statement explaining their view of the positions of the parties in negotiations prior to the strike. The members of the Board publicly announced that they had four options open to them and that these were:

> "(a) meet their requests.
>
> (b) fill the school with substitutes.
>
> (c) ask for a court order returning them to class.
>
> (d) send them a letter of termination and hire permanent replacements." (A. 114)

Intensified collective bargaining, mediation and arbitration were not mentioned as options by the Board. The Board members announced that they had chosen to fill the school with substitutes at that time "because they felt the strike would be short lived." (A. 114) Without terminating the teachers, the Board was able to open the school using substitutes. (A. 192)

On March 29, 1974, the Hortonville Board of Education decided to implement option (d) by scheduling disciplinary hearings for each individual teacher who was then engaged in a strike. Notices of disciplinary hearings were prepared and delivered to the Outagamie County Sheriff's Department for service on each teacher. Eleven teachers were served notices, including the day of service, four days before the scheduled hearing. Fifty-one teachers were served three days prior to the hearing. Twenty-two teachers were

served two days prior to the hearing. Three teachers were served one day prior to the hearing and one teacher received her notice on the day of her hearing. (A. 175-176)

These notices charged the teachers with breach of their employment contract and engaging in an unlawful strike. The notices advised that the teachers could be disciplined with termination of the employment contract and that after a hearing, "the Board will notify [the teachers] in writing of what disciplinary action, if any, the Board has determined appropriate." (A. 163-164) The notices at no point advised that the contracts for employment during the 1974-1975 school year were threatened.

On the first day set for hearings, April 1, 1974, the teachers attended *en masse*. At that hearing the counsel for the teachers objected to the sufficiency and adequacy of the disciplinary hearing notices, objected to the Board of Education acting as the decisionmaker in their cases, requested the opportunity to present evidence in defense and in mitigation of punishment, made an offer of proof when that request was denied, requested and was denied the opportunity to adversely examine members of the Board, who were parties to the bargaining underlying disciplinary hearings, and protested the fact that the Board's attorney acted as both prosecutor and counsel for the decisionmaker. (A. 69, 91, 93-96)

At a closed meeting on April 2, 1974, the Board of Education voted to terminate the employment of the teachers. Notices of termination were then sent out. Those notices purported to terminate the existing contracts for the 1973-1974 and the future contracts for the 1974-1975 school years. (A. 157-158)

Following the terminations, the respondents, the Hortonville Education Association and six of the fired teachers, brought a class action in the Circuit Court for Outagamie County, Wisconsin, against the school district, the Board of Education, the members of the Board and the administrators of the school district. The amended complaint alleged four separate causes of action. (A. 132-142)

The first and principal cause of action challenged the conduct of defendants on due process grounds, relying on both the Fourteenth Amendment to the United States Constitution and Article I of the Wisconsin Constitution. (A. 138) Essentially, the complaint alleged that the notice and hearing provisions afforded were inadequate. The second cause of action alleged a denial of equal protection with respect to favored treatment by the Board toward teachers who were not represented by the Hortonville Education Association. The third cause of action challenged the Board's conduct on the grounds that it was taken in violation of the Wisconsin Open Meeting Law, §66.77, Wis. Stats. The fourth cause of action challenged the Board's conduct with respect to hiring replacement teachers.

The Circuit Court granted the Board's motion for summary judgment with respect to the first cause of action of the complaint and sustained their demurrers with respect to the second, third and fourth. (A. 210-212) [1]

The trial court, in granting summary judgment, examined the record to determine the areas of factual controversy which could be resolved by a trial. [2] The trial court

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[1] Only the first cause of action contains the issues presented here.

[2] Under Wisconsin law, a motion for summary judgment is not deemed to be a trial by affidavit. If there are disputes with respect to the relevant facts or the inferences to be drawn from the facts, the motion should be denied and the case should be set for trial on the merits. *Peterson* v. *Truck Ins. Exchange,* 65 Wis. 2d 542, 546, 223 N.W. 2d 579 (1974).

concluded that, under Wisconsin law, a striking employee had not quit his employment. The trial court, applying Wisconsin law, held that a discharge by the employer was required to sever the employer-employee relationship, citing *Marathon Electric Mfg. Corp.* v. *Industrial Commission,* 269 Wis. 394, 69 N.W. 2d 573 (1955) and *Fredericks* v. *Industrial Commission,* 4 Wis. 2d 519, 91 N.W. 2d 93 (1958). (A. 187)

The trial court then went on to analyze the property and liberty interests of the teachers. The trial court held that there was a dual property interest. First of all, the teachers had an interest in their then-existing individual contracts for the 1973-1974 school year. Secondly, the teachers had an interest pursuant to state law in working during the 1974-1975 school year due to the operation of §118.22(2), Wis. Stats. and the fact that the actions of the School Board took place after March 15, 1974. (A. 190) With respect to the liberty interests of the teachers, the court concluded that the charges against the teachers established a sufficient stigma under local conditions "that in all likelihood . . . the plaintiff teachers' prospective employment opportunities [would be diminished]." (A. 191) The trial court thus concluded that the due process provisions of the state and federal constitutions were applicable.

The trial court then proceeded to analyze the scope of the hearing which was required under the circumstances of this case. The trial court noted that there was no dispute within the affidavits presented to the court in support of and in opposition to the motion for summary judgment with respect to the question of whether the teachers were in fact on strike. (A. 185) The trial court concluded that the concession of this fact by the teachers avoided the need for a fair and impartial tribunal.

> "The plaintiff class either was on strike in violation of Sec. 111.70(4)(1), Stats., or it was not on strike. If the fact was that a strike was in existence as set forth in the defendants' affidavit herein, then there could be no defense to the charge for Sec. 111.70(4)(1) expressly prohibits strikes in the public employment sector." (A. 195) [3]

The trial court went on to note that if the Wisconsin law allowed a defense to the charge of striking such as provocation or justification, then the procedures employed by the School Board would probably not have been sufficient to comport with the commands of the Constitution. (A. 196-198) Thus, the trial court concluded that under the precise circumstances of this case, coupled with its view of the applicable Wisconsin law, due process was not violated. [4]

The teachers petitioned the Wisconsin Supreme Court to assume original jurisdiction in this case. (A. 216-226) On September 24, 1974 the petition for original jurisdiction was denied, but the Wisconsin Supreme Court entered an order allowing an expedited appeal. (A. 227-228) The court also allowed the teachers to present all constitution-

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[3] This was the critical analysis of Wisconsin law which was ultimately determined to be erroneous by the Wisconsin Supreme Court. The trial court failed to recognize that discharge was not an automatic penalty and that any penalty must consider the entire situation which led to the strike for purposes of mitigation.

[4] With respect to the third cause of action challenging the secret meeting of the Board, the trial court held that there was no violation of Wisconsin law. On appeal of that issue, the Wisconsin Supreme Court affirmed the sustaining of the demurrer. No argument is presented to this Court concerning that ruling. With respect to the second and fourth causes of action, those were repleaded and have not been the subject of any appeal for they are still pending in the trial court.

al issues involved, even though some of these issues may not have been presented directly in the trial court. (A. 236), 66 Wis. 2d at 479, 225 N.W. 2d at 663.

On February 5, 1975, the Wisconsin Supreme Court handed down its decision. The summary judgment entered by the circuit court was reversed and the case was remanded to the trial court for further proceedings consistent with the Supreme Court's opinion.

While the court rejected several constitutional arguments raised by the teachers, it agreed that due process had been denied them because of a lack of a fair and impartial decisionmaker. The Court agreed with the trial court that the teachers, under Wisconsin law, had a dual property interest in their jobs for the 1973-1974 school year and for the 1974-1975 school year. The Supreme Court also agreed with the trial court that the teachers' liberty interests were threatened by the actions of the Board. Therefore, the Wisconsin Supreme Court, in agreement with the trial court, concluded that due process of law must be provided to the teachers. At this critical juncture, the Supreme Court of Wisconsin held that under Wisconsin law there were more issues to be determined by the decisionmaker than merely whether there was a strike in progress.

> "It is important to note that procedural due process is not limited to the factual determination as to whether an individual did or did not engage in the particular conduct. It extends as well to the action taken by the state once that conduct is established. As stated in *Morrissey, supra*, page 488:
>
> > 'This [due process] hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that violation does not warrant revocation.'
>
> "Therefore it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decisionmaker be charged with the responsibility of determining what action shall be taken on the basis of those facts. The principle of fair play is an important factor in a consideration of due process of law. *General Electric Co.* v. *Wisconsin Employment Relations Board* (1958), 3 Wis. 2d 227, 241, 88 N.W. 2d 691; *Durkin* v. *Board of Police & Fire Comm.* (1970), 48 Wis. 2d 112, 122, 180 N.W. 2d 1." (A. 252), 66 Wis. 2d at 493, 225 N.W. 2d at 671.

Thus, the court held that under Wisconsin law discharge is not an automatic penalty for engaging in a prohibited public employee strike and that the penalty to be imposed, if any, must be reasonable under all of the circumstances. An examination of the circumstances includes a full analysis of the activities of all of the parties prior to the strike. [5]

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[5] Justice Robert Hansen in a concurring opinion, believed that "straight" contract law was applicable in this case. Under Wisconsin law the failure to show up for work does not automatically allow rescission. Litigation will ultimately be necessary to determine the status of the parties. In this litigation, under Wisconsin law, analysis of the circumstances, including the actions of the Board, would be considered. (A. 267) 66 Wis. 2d at 506, 225 N.W. 2d at 677. The position advocated by the petitioners before this Court, that the existence of a strike is the only issue under Wisconsin law, was only accepted by the two dissenters on the seven man Wisconsin Supreme Court.

Further interpreting Wisconsin law and procedure, the Wisconsin Supreme Court found that the Board was responsible for negotiating the school district's position with the teachers and, at the same time, had the authority to impose punishment for engaging in a prohibited strike. The Wisconsin Supreme Court held that this situation allowed the School Board to conclude the bargaining process on its own terms by exercising the expedient power to discharge the teachers, who were their adversaries in the negotiating process.

> "[The Board members] were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop." (A. 253), 66 Wis. 2d at 494, 224 N.W. 2d at 671.

The possession of such a weapon by one of the parties to an underlying dispute created such a real risk of partiality when that party sat as a decisionmaker with respect to the other party's conduct as to violate basic principles of due process of law.

The Wisconsin Supreme Court, having determined that the situation presented by this case reflected an area of unfairness under present Wisconsin law, further decided to interpret that law to avoid constitutional problems. Relying upon a Wisconsin Constitutional provision[6], the Wisconsin Supreme Court fashioned a temporary remedy.[7]

[6] Sec. 9, Art. I, Wisconsin Constitution.

[7] The court held that this remedy would cease upon enactment of appropriate legislation. (A. 257), 66 Wis. 2d at 498, 225 N.W. 2d at 673.

The Court held that in circumstances in which a teacher has property or liberty interests at stake thereby entitling him to due process, and a school board is considering discipline, the teacher is entitled to notice, a hearing and a statement of reasons. The court also held that in those rare situations like the one at bar, where the above stated factors are present and, in addition, the school board is in an adversary position, the school board can make the initial decision with respect to imposition of discipline[8] but a dissatisfied teacher "can, upon petition, obtain a *de novo* determination *of all issues* in any court of record in the county where the school district or a part of it is located." (A. 257), 66 Wis. 2d at 498, 224 N.W. 2d at 673. (Emphasis supplied).

Both parties moved for rehearing before the Wisconsin Supreme Court. The Board argued, on various grounds, that due process was either not required or had been satisfied. The teachers argued that since a violation of their right to due process had been found, the purported discharges were of no legal effect and that they were entitled to immediate reinstatement with a claim for back pay until such time as a meaningful hearing complying with due process requirements was held. On March 28, 1975, the Wisconsin Supreme Court, after correcting a part of its opinion, denied both motions for rehearing. (A. 284), 66 Wis. 2d at 507a, 225 N.W. 2d at 678.

The School Board and the other defendants below then petitioned for certiorari to this Court. The teachers filed

[8] Thus, the statute involved was not declared unconstitutional as applied. A procedure to avoid constitutional attack was devised.

a conditional cross petition.[9] On October 6, 1975, this Court granted the Board's petition. To date, no action has been taken on the conditional cross petition.

SUMMARY OF ARGUMENT

This case is concerned with due process requirements in the course of disciplinary proceedings involving teachers who have property and liberty interests implicated by those proceedings. The teachers were discharged as a penalty for striking, not to open schools. The case does not involve an assessment of the propriety of teacher terminations as a vehicle to reopen schools because the terminations were neither necessary for nor accomplished because of such a goal. There were many means available to the School Board to reopen the schools, had that truly been its wish, without discharging the teachers. The procedures utilized in discharging the teachers must be viewed in the same context in which they were actually intended, that is, as part of a disciplinary proceeding aimed at punishment.

Under Wisconsin law, the purpose of the disciplinary hearing was not only to determine whether the teachers did in fact engage in a prohibited strike, but also to consider every other relevant aspect surrounding the strike. The entire set of events must be viewed fairly and impartially because of the requirement under Wisconsin law that any penalty to be imposed for engaging in a prohibited strike must be reasonable under all the circumstances. Dis-

[9] *Hortonville Education Association, et al.*, v. *Hortonville Joint School District No. 1, et al.*, Conditional Cross-Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin, October Term, 1974, Case No. 74-1638.

charge is not an automatic penalty nor is it an alternative available simply at the whim of the decisionmaker. Surrounding circumstances, such as those tending to show mitigation, may well warrant the imposition of a lesser penalty or none at all and may make discharge unreasonable.

The trial court and the Wisconsin Supreme Court found that the teachers had property and liberty interests entitling them to procedural due process protections at the time of the disciplinary hearings. Their property interests existed by virtue of employment contracts, statutory renewal procedures and a master agreement between their union and their employer limiting discharge to just cause. Because discharge could only be imposed as a penalty if reasonable under the circumstances, due process required a decisionmaker sufficiently impartial to give a fair assessment of the circumstances surrounding the strike in order to determine the appropriateness of any penalty assessed.

The School Board was an adversary of the teachers in the factual circumstances giving rise to the strike. The teachers allege that bargaining between their union and the School Board was intentionally stifled by the Board in order to provoke a strike and give ostensible justification for terminating the teachers and thereby destroying the union. The School Board made public statements prior to the disciplinary proceedings in which it defended its own conduct and placed the blame for negotiation deadlocks on the teachers and their union. Consequently, when the School Board sat as a decisionmaker to impose "reasonable" punishment on the teachers it was in a position where it would be required to judge its own conduct. In fact, the Board actually refused to allow any consideration

of its conduct thereby precluding any meaningful exposition of the facts involved. The Board was so intertwined in the underlying controversy and had so wedded itself to a position adverse to the teachers that it could not practically view the teachers' position impartially in that to do so might require criticism of its own conduct. Under those circumstances, the Wisconsin Supreme Court was correct in finding that the probability of bias was so high as to preclude the School Board from having unquestionable authority with respect to the imposition of what is required to be a reasonable penalty.

The decision of the Wisconsin Supreme Court accommodates the conflicting interests involved. It places the fundamental principle of due process of law in the paramount position to which it is entitled. At the same time, the decision provides a vehicle to minimize the financial exposure of taxpayers in cases of potential violations of employee rights by public officials who are likely to lack impartiality through the requirement that action taken be subject to prompt *de novo* judicial review. The ruling does not inhibit the legislative granting of property rights but simply insures that due process requirements arising from the granting of rights will in fact be respected.

Wisconsin has a long and innovative history in the area of labor relations. The State's concern with labor relations has extended into the area of public employment as well. The fundamental goal throughout this historic experience has been to provide a framework of fairness to promote peace, and the decision of the Wisconsin Supreme Court in this case is consistent with that goal.

ARGUMENT

I.

THIS CASE DOES NOT CONCERN THE ARSENAL AVAILABLE TO A SCHOOL BOARD TO REOPEN A SCHOOL WHICH HAS BEEN STRUCK; THE ISSUES INVOLVED IN THIS CASE CONCERN THE PROCESS DUE TO TEACHERS WHO ARE DISCIPLINED BY A STATE AGENCY.

The petitioners and their *amici* at various points argue that this case is concerned with the ability of a school board to reopen its schools when they have been struck in contravention of state law. In fact, the case involves the imposition of discipline upon municipal employees and the process due in such circumstances.

The Board had several alternatives available to it had its goal truly been simply to reopen the schools. Under Wisconsin law, it could have sought judicial intervention in the form of an injunction proceeding. *Joint School District No. 1, City of Wisconsin Rapids* v. *Wisconsin Rapids Education Association,* ..... Wis. 2d ....., ...N.W. 2d ..... (1975) (Case No. 116, August Term, 1975). The School Board could also have sought factfinding before the Wisconsin Employment Relations Commission. §111.70 (4) (c) 3, Wis. Stats. The School Board could have sought mediation before the Wisconsin Employment Relations Commission (WERC). §111.70(4)(c) 1, Wis. Stats. The School Board could have intensified or, at a minimum, continued negotiations with the teachers. It could have hired substitutes.

In this case, the School Board opened the schools prior to the termination of the teachers by employing substitute teachers. Indeed, it is these substitute teachers who became

the core of the permanent replacement teachers subsequent to the discharge of the teachers. There is no showing in this record that the Board would have had any difficulty staffing the school with substitute teachers without first discharging the striking teachers. Thus, the ability and power of the Board to reopen the schools are not at issue here. The only issue here is the procedures due the teachers when discipline is imposed against them by their adversaries in a dispute. This is a municipal employee discipline case.

The Board argues at page 13 of the Brief for Petitioners that the teachers were terminated in order to hire replacements. This argument is specious, at best, and there is no citation to any part of the record to support the statement. Other teachers could well have been continued as substitutes rather than replacements with equal success even if the Board truly had felt there was no action it could take to convince the striking teachers to return to their classrooms. In fact, since substitute teachers were placed in the classes and the schools were reopened, the record itself demonstrates conclusively that discharge was not necessary to reopen the schools.

By discharging the teachers, the Board prevented them from returning to their jobs and totally frustrated collective bargaining, the goal of Wisconsin law.[10] §111.70(6), Wis. Stats. By merely hiring substitutes without discharge the Board could not possibly create a monetary risk for

[10] If this case is ever tried, the teachers are prepared to prove that they made an offer in a related lawsuit in April of 1974 to return to their jobs conditioned only upon discipline being imposed by an impartial decisionmaker. This offer was rejected by the Board. This case is referred to in the concurring opinion of Justice Robert Hansen. (A. 267-268), 66 Wis. 2d at 506-507, 225 N.W. 2d at 678.

two staffs, and the School Board well knows that. Striking teachers do not get paid in Wisconsin. See Brief for Petitioners, p. 31.

The path pursued by the School Board was consistent with one goal—to create a situation in which the teachers were forced to engage in a job action, thereby presenting an ostensible justification for the drastic action of discharge. Its action with respect to discharge is not at all consistent with its statements in its brief that the purpose was to open the schools.

It is very easy for the Board at this juncture to state that its purpose in discharging the striking teachers was motivated by its desire to reopen the school. It is easy because there has never been any trial of this matter to determine the truth of that statement. The Wisconsin Supreme Court registered skepticism that this action was necessary to reopen the schools. That court indicated that the Board had available to it "mediation, injunction, continued collective bargaining or arbitration". (A-255), 66 Wis. 2d at 496, 225 N.W. 2d at 672.

The teachers submit that a job action was the only practical method to obtain intensive bargaining with this unresponsive, slow moving School Board. The teachers also believe that the Board refused to bargain in good faith and that it was attempting to destroy their union. They believe that they will be able to prove this if they are allowed to proceed and have the issues surrounding their discharge examined by an unbiased decisionmaker. The teachers also believe that they will be able to prove that at some point in March of 1974, prior to their discharge, the Board locked out the teachers from the school. (A-95). The teachers also believe that they will be able to prove that the Board ignored all alternatives other than discipline and all

types of discipline other than discharge because discharge was the goal of the Board all along.

The Wisconsin Supreme Court recognized that this was a discipline case and recognized the inherent unfairness of allowing public employment to be terminated under circumstances such as these. (A-252), 66 Wis. 2d at 493, 225 N.W. 2d at 671. Contrary to the petitioners' statements (Brief for Petitioners, p. 13), however, the Wisconsin Supreme Court did *not* hold that the School Board could not discharge the teachers under the federal Constitution. The Wisconsin court held that in all situations the discharge decision must be made by the Board in the first instance, but pointed out that in situations where due process is applicable and the School Board and teachers are in adversary positions, the teachers should have the right of *de novo* consideration of all issues before an impartial judicial officer. (A. 256-257), 66 Wis. 2d at 497-498, 225 N.W. 2d at 673. That decision was based upon due process of law pleaded as arising from both the United States and Wisconsin Constitutions. (A 138).

There is no dispute that municipal employee strikes, including those engaged in by public school teachers, are prohibited under Wisconsin statutory law. §111.70(4)(1), Wis. Stats. There is no dispute that discipline may be imposed upon striking municipal employees. There is also no dispute that discharge may be one of the penalties allowed[11] In the absence of judicial intervention, there is no

[11] The only statutory penalty for engaging in a strike, however, is a fine of $10.00 per day and then only if striking continues following a judicial order compelling a return to work. §111.70(7), Wis. Stats. The union itself can be subjected to a fine under contempt proceedings. *Kenosha Unified School District No. 1* v. *Kenosha Education Association,* ..... Wis. 2d ....., ... N.W. 2d ....., (1975) (Case No. 157, August Term, 1975).

automatic penalty for striking, and, in fact, any penalty imposed must be reasonable under all of the circumstances. *Durkin* v. *Board of Police and Fire Comm.,* 48 Wis. 2d 112, 180 N.W. 2d 1 (1970).

The Wisconsin Supreme Court said that the determination of reasonableness of penalty includes a consideration of all of the options available to the Board. Thus, under Wisconsin law, the bald assertion by the Board in this brief that they had to fire the teachers to open the schools is nothing more than a defense which needs to be tried. The teachers dispute that factual assertion. It is a factual issue like all others, to be determined upon trial. Obviously, if the Board is successful in persuading the trier of fact that this action was necessary to open the schools and that the district was threatened with irreparable harm, then perhaps the discharges were reasonable under Wisconsin law. In any event, there is no way that this can be accepted as a fact prior to a trial. The record presently before the Court indicates substantial question with respect to the validity of that claim by the School Board especially since they were able to open the schools prior to discharge.[12]

[12] An example of allegations asserted as "facts" before this Court which must be tested in the state courts is found on page 17 of the Brief for Petitioners. There it is stated that 180 days of school must be held before June 30 of each year or state aids will be lost. The respondents dispute that statement. Although §115.01(6), Wis. Stats., defines the "school year" as commencing July 1 and ending June 30, neither §121.02(1)(h) nor §121.17(2)(a) requires that the 180 days of school in a year coincide with the "school year". Cf. §PI 8.01(2)(h), Wis. Adm. Code. Furthermore, under §121.17(2), state aids need not be withheld if a failure to meet the minimum number of school days "was occasioned by some extraordinary cause not arising from intention or neglect on the part of the responsible

(footnote continued)

Thus, this is a disciplinary proceeding with respect to municipal employees and the question concerns the process due in such a disciplinary proceeding. The issue to be determined in any such hearing is the reasonableness of any penalty to be imposed under all of the circumstances of this case. Whether the Board had to fire the teachers in order to reopen the schools or had other options available to it are, at best, defenses and factors to be considered by the trial court in determining reasonable discipline. They are matters to be determined upon a trial applying Wisconsin law.

II.

THE PETITIONERS AND THEIR AMICI IMPROPERLY STATE THE PRESENT STATUS OF WISCONSIN LAW WHEN THEY ASSERT THAT THE ONLY ISSUE TO BE DETERMINED IN ANY HEARING AFFORDED TO THE TEACHERS IS WHETHER THEY WERE ON STRIKE; EVEN ASSUMING THAT THE TEACHERS WERE ON STRIKE, THE PENALTY TO BE IMPOSED, UNDER WISCONSIN LAW, MUST BE REASONABLE UNDER ALL CIRCUMSTANCES OF THE CASE AND DISCHARGE IS NOT THE AUTOMATIC PENALTY.

The underpinning of the position taken by the petitioners and all of their *amici* is either a subtle suggestion or a

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(footnote continued)
officers." Thus, if the Board members are as faultless as they suggest, they should have no fears. In any event, as a practical matter the argument is immaterial:

> "[A]pparently no school district has been denied state aid for failing to meet this test despite the occurrence of strikes". Feinsinger and Roe, "Teacher Collective Negotiations", as printed in *A Candid Discussion of Issues in Education*, commissioned by Wisconsin Department of Public Instruction (1975), Ch. 9, at 133.

flat statement that the only issue to be determined in any hearing is whether a strike was being engaged in by the teachers. Although only intimated at earlier points in the petitioners' brief, it is concluded at page 24 that "the School Board accurately determined that the teachers were striking." This turns into an argument at page 26 that "prior cases do not hold that a government cannot exercise the discretion given to it by statute where the facts are undisputed."

The "facts" which the petitioners assert are undisputed is the single fact of striking. That is the precise position taken by the petitioners before the trial court in this case and adopted by the trial court. The argument is that if striking can be established, there are no other facts to be determined or considered by the agency because the penalty of discharge is automatic. The Wisconsin Supreme Court stated that the law of Wisconsin is not that simple. The issue of reasonableness of penalty to be imposed for the improper conduct is also present and requires the decisionmaker to take into account all of the various factors surrounding the dispute, including the activities of the Board itself. That critical fact is conveniently forgotten by the petitioners.

The *amici* for the petitioners totally misinterpret the opinion of the Wisconsin Supreme Court with respect to state law by similarly limiting what they believe to be the area of inquiry in any such hearing. The brief of the National School Boards Association states, at page 16:

> "Even if it is assumed that ultimately futile collective bargaining negotiations culminating in a strike will generate antagonism between School Board members and the union, or the teachers' representatives, or even the teachers as a group, it is not reasonable

> to assume that such antagonism would render a School Board member incapable of accurately determining whether an individual teacher engaged in an illegal strike."

The *amicus curiae* brief on behalf of the County of Broome, State of New York, at page 13, states:

> "Assuming public employees are entitled to an initial determination of whether they are on strike, whether that determination must be made by the courts rather than by the public employer depends upon the balancing of interests in light of the realities."

The brief of the petitioners and the two *amici* briefs mentioned above are actually masking their real argument. They are surreptitiously asking the United States Supreme Court to overturn the decision of the Wisconsin Supreme Court with respect to the latter's interpretation of Wisconsin law. The other two *amici* briefs on behalf of the petitioners are not so subtle in their approach. They practically assert directly that the Wisconsin Supreme Court misinterpreted Wisconsin law.

The brief of the Wisconsin Association of School Boards, Inc., states, at page 14:

> "The Wisconsin Supreme Court found that procedural due process is constitutionally required when determining what course of action should be taken on the facts. *Amicus* will, in the next sub-part of this brief, submit that the Court misinterpreted the purpose of the hearing."

Clearly, the real argument of petitioners is that the Wisconsin Supreme Court incorrectly decided the purpose of a Wisconsin hearing under Wisconsin law. Of course, that is not an issue for the United States Supreme Court since this Court must accept the meaning of Wisconsin law as stated by Wisconsin courts. *Groppi* v. *Wisconsin*, 400 U.S. 505, 507 (1971).

The brief on behalf of the Chamber of Commerce of the United States of America, as *amicus curiae*, really states the issue as bluntly as possible at page 18:

> "The Wisconsin Supreme Court's decision that an impartial decisionmaker be interposed in such a case so that all facts will be considered and a reasonable response selected is tantamount to saying that some public employee strikes are justifiable under Wisconsin law and a response less severe than discharge should be selected when the facts and evidence appear to justify the strike."

That statement is a reasonably complete and accurate analysis of the Supreme Court of Wisconsin's interpretation of Wisconsin Law. The Wisconsin Supreme Court did not hold that, under Wisconsin law, discharge was an automatic penalty for striking.[13] That was the erroneous conclusion of the trial court here. The Wisconsin Supreme Court held that the determination that a strike is in progress is only one fact which must be determined by this type of disciplinary hearing.

Any response to the fact of striking must be reasonable after a consideration of each and every factor which surrounds the strike. As correctly observed by the Chamber of Commerce, the Wisconsin Supreme Court held that the teachers can defend and mitigate their actions by showing the intransigence of the Board.

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[13] Congress established discharge as the penalty for striking. 5 U.S.C. §7311(3)(4). Congress has also declared striking to be a crime. 18 U.S.C. § 1918(3)(4). New York's Taylor Act provides substantial sanctions. 9 Civil Service Law, §210 (N.Y., McKinney), reprinted at 18-24, *Amicus Curiae* Brief on Behalf of County of Broome, State of New York. The Wisconsin Legislature created no penalty for striking except upon violation of an injunction. §111.70(7), Wis. Stats.

It is in this setting that the decision of the Wisconsin Supreme Court must be viewed. It is in this setting and Statement of Wisconsin law that the Wisconsin Supreme Court reversed the decision granting summary judgment and remanded the case for further proceedings to the trial court.[14] In those further proceedings, the trial court will be presented with all of the various factors and events leading up to the strike. After an appropriate record has been made, the trial court will then be in a position to make

[14] It is because of the setting and the statement of Wisconsin law that the respondents challenged the petitioners' jurisdictional claim in the brief in opposition to the petition for certiorari. Under 28 U.S.C., §1257(3), the basis claimed by the petitioners, there must be a final judgment or decree from a state's highest court and the validity of a state statute must be drawn into question on the ground of being repugnant to federal law. Neither factor is present here.

The order of the Wisconsin Supreme Court vacated a summary judgment and remanded for proceedings on the merits, and either side can seek further review from the Wisconsin Supreme Court following that proceeding. §274.09, Wis. Stats. The judgment is not final. *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178, 180-81 (1952); *Market Street R. R. Co.* v. *Railroad Comm.*, 324 U.S. 548, 551 (1945). Section 1257 was not intended to allow piecemeal review of state court judgments. *Local No. 438* v. *Curry*, 371 U.S. 542, 550 (1963).

Although §118.22(2) of the Wisconsin Statutes was challenged on due process and equal protection grounds, the decision avoided the challenge by construction and procedure delineation which saved it. (A-256-257), 66 Wis.2d at 497-498, 225 N.W.2d at 673. The Wisconsin court also relied on state cases in even finding an initial reason to create a procedure. (A-252), 66 Wis. 2d at 493, 225 N.W.2d at 671. Consequently, no state statute was found repugnant to federal law, and the party who challenged the statute is not prosecuting this review.

findings of fact and conclusions of law with respect to the activities of the teachers and of the Board in this dispute.[15]

This result harmonizes Wisconsin's municipal employment relations law with respect to teachers and law enforcement or firefighting employees. Section 62.13(5)(i) of the Wisconsin Statutes allows *de novo* judicial review of the reasonableness of disciplinary proceedings against police and fire employees, including *de novo* review of the reasonableness of any penalties imposed. In *Durkin* v. *Board of Police & Fire Comm.*, 48 Wis. 2d 112, 180 N.W.2d 1 (1970), the Wisconsin Supreme Court held that the leader and supervisory officer in a strike had a right to have the reasonableness of the penalty determined by a judicial proceeding.[16] There, discharge was not even considered even though firemen were involved, a vital municipal service. The Wisconsin Supreme Court indicated that even a

[15] The briefs of the petitioners and their *amici* consistently refer to a sketchy record. The teachers point out that the decision of the Wisconsin Supreme Court is amply supported by the record available. However, it is incongruous for the Board to be complaining about the record in this case since they are the ones who have prevented the teachers from making a record. Before the Board, the teachers wished to make a record about the bias of the Board but were prevented from doing so by a ruling of the Board that this was not an appropriate issue. Subsequently, this case was won by the petitioners before trial on a motion for summary judgment.

[16] The Wisconsin Supreme Court cited *Durkin* for the proposition that an impartial decisionmaker was necessary to determine "what action shall be taken on the basis of" even undisputed or stipulated facts. (A-252), 66 Wis.2d at 493, 225 N.W.2d at 671.

lengthy suspension without pay might be unreasonable under the circumstances.[17]

The teachers presented this disparity of rights to the Wisconsin Supreme Court as an equal protection argument. This is mentioned as issue 3 in the opinion of the Supreme Court of Wisconsin. (A-235), 66 Wis.2d at 478, 225 N.W.2d at 663. Since the court created a remedy of *de novo* review in harmony with rights afforded police and fire employees, the issue was never again discussed by the Wisconsin Supreme Court for it became moot.[18]

Consistent with this general philosophy of investigation of all of the circumstances of a municipal labor dispute, the Wisconsin Supreme Court recently ruled that a school board could not secure an injunction against strikers by merely showing the existence of the strike. *Joint School District No. 1 City of Wisconsin Rapids* v. *Wisconsin Rapids Education Association,* ..... Wis. 2d ....., N.W.2d ..... (1975) (Case No. 116, August Term, 1975).

[17] In *Durkin,* the decisionmaker in the first instance was the Board of Police and Fire Commissioners. They were not the body charged under Wisconsin law with negotiating with the union. Thus, they did not suffer from the same constitutional infirmity as the Hortonville Board. Despite this, Durkin, under Wisconsin law, had a right to a judicial decision on the reasonableness of the penalty under *all* of the circumstances.

[18] The teachers in their conditional cross petition for a writ of certiorari request review of the equal protection issue in the event this Court decides adversely to the teachers with respect to the due process question. Police and fire employees in Wisconsin obtain *de novo* judicial consideration of the reasonableness of any discipline imposed upon them whether or not the fire and police commission are adversaries. At this juncture, teachers only obtain *de novo* review when there is an adversary relationship.

> "Public employment strikers are a reality which cannot be ignored. While the potential for immediate and serious harm to public health and safety is very real in the case of strikes by policemen, firemen and, to a lesser extent, sanitation workers, it is not critical where, for example, the strike is one by teachers, clerical employees or construction workers and others. We conclude in this case that immediate and serious harm to public health and safety was not apparent and that an injunction should issue only after a showing of irreparable harm dependent upon the facts and circumstances as shown at the hearing."
>
> (Slip opinion pp. 15-16).

The trial judge in that case made a condition of the injunction that the School Board bargain in good faith, and in a contempt proceeding he concluded that there had been a violation by the teachers of his order upon making a finding that the Board had bargained in good faith subsequent to the order.

It thus appears that even though Wisconsin law prohibits strikes, injunctions against teachers' strikes are not automatic. The conduct of the parties can be reviewed in such a judicial proceeding.[19] With respect to strikes by police and fire employees, penalties may be imposed against the leaders of a strike, but the reasonableness of the penalty under

[19] If the Wisconsin Supreme Court is reversed in this case, then Boards will resort more and more to discharge because procedurally this will be an easier, although brutal, method to resolve municipal labor disputes. The purpose of the Wisconsin Act is to promote peace in such labor disputes. If the most drastic resolution, discharge, is the easiest one, the purposes of the Wisconsin Act will be demolished. All of the decisions of the Wisconsin Supreme Court force the parties, *no matter what they try to do,* under all circumstances to an impartial, neutral and detached decisionmaker who undoubtedly will press for a resolution to the dispute.

all of the circumstances can be reviewed in a *de novo* judicial proceeding.

The decision of the Wisconsin Supreme Court in interpreting Wisconsin law in this case merely harmonized the other areas of Wisconsin municipal employment relations law with respect to an attempt by a school board to discharge teachers. The penalty to be imposed for striking is not automatic in Wisconsin. Discharge is just one of many possible punishments, if any, to be imposed for the conduct. Furthermore, *de novo* judicial review of the penalty is available so that all of the facts and circumstances, including the conduct of the Board itself, can be reviewed in making a judgment.

The petitioners and their *amici* totally misconstrue Wisconsin law when they attempt to assert that the school boards in Wisconsin have unreviewable discretion to deal with teachers who are on strike. The issues to be resolved are much greater than merely whether the teachers were on strike. It is in this context of Wisconsin law that the due process claims of the teachers must be considered.

III.

THE DECISION OF THE WISCONSIN SUPREME COURT CORRECTLY HELD THAT DUE PROCESS OF LAW WAS REQUIRED AND THAT ONE OF THE ELEMENTS OF DUE PROCESS IS AN INDEPENDENT DECISIONMAKER.

The question presented by the petitioners concerns whether the School Board was prohibited by principles of due process from terminating the teachers because the School Board was not sufficiently impartial. (Brief for Petitioners, p. 2). The question presented concedes a lack of sufficient impartiality on the part of the School Board.

Consequently, the issues are: (1) Were the teachers entitled to due process of law under either the state or federal constitution at the time termination was contemplated; and (2) if so, was an independent decisionmaker one of the elements of the process due.

The teachers alleged in their amended complaint to the state circuit court that they were entitled to due process of law in the disciplinary proceedings pursuant to the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution. The circuit court, and, ultimately, the Wisconsin Supreme Court, agreed. Both courts held that the teachers were entitled to due process because they were deprived of their property and because their liberty was interfered with as a result of state action.

There is no dispute that state action is present. The petitioner Hortonville Joint School District No. 1 is organized under the laws of the state and is a municipal employer. §111.70, Wis. Stats. The petitioner School Board and its members are charged with the responsibility of managing the petitioner school district. Chapters 118, 120, Wis. Stats.

A. The Teachers Had Property Interests Which Were Sufficiently Implicated to Give Rise To Due Process Requirements.

The existence of property and liberty interests is essentially a matter of state law, and both state courts agreed that property interests were implicated under the facts of this case.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate

claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972).

In addition to state laws and rules, legitimate expectations of continued employment giving rise to property interests can clearly be founded upon contractual arrangements between the parties.

"A written contract with an explicit tenure provision clearly is evidence of the formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown." *Perry* v. *Sindermann,* 408 U.S. 593, 601 (1972).

In fact, expectations of continued employment and resulting property interests can exist in the absence of statutes, rules or contracts, if the circumstances denote implied agreements resulting from the parties' conduct in view of surrounding circumstances and past history. *Id.* at 602.

In this case, the property interests arise by the most direct of methods. With respect to the 1973-1974 school year, the teachers were in the midst of their contract period and their employment was terminated despite the existence of individual contracts. Teachers removed from office during the terms of their contracts are clearly entitled to due process. *Wieman* v. *Updegraff,* 344 U.S. 183 (1952).

A property interest exists under such circumstances. *Carpenter* v. *City of Greenfield School District No. 6,* 358 F. Supp. 220 (E.D. Wis. 1973). Furthermore, the parties were operating under an extension of the last (1972-1973) collective bargaining agreement which allowed discharge only for "just cause". (A. 43) See *Connell* v. *Higginbotham,* 403 U.S. 207 (1971).

With respect to the 1974-1975 school year, for which the school board purported to withdraw "and/or" terminate individual contracts, the teachers had an expectation of continued employment based on state law. Section 118.22 (2) of the Wisconsin statutes requires that notice of renewal or refusal to renew individual contracts be given on or before March 15th of each year. No refusal to renew had been given by that date. Consequently, the teachers were entitled to employment for the 1974-1975 school year under the terms of their existing individual contracts, according to the statute. Cf. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

As stated by the Wisconsin Supreme Court, because of the existence of the 1973-1974 contracts and the statutory entitlement to contracts for the 1974-1975 school year, the action by the school board seeking to terminate the teachers' employment "unquestionably amounted to a deprivation of property within the intendment of the due process clause." (A. 248), 66 Wis. 2d at 489, 225 N.W. 2d at 669.

The petitioners dispute that and suggest that the teachers abandoned their property interests by engaging in a strike. They also argue that if process is due, it is limited by the terms of employment and was met here.

B. The Teachers Did Not Abandon Their Property Interests.

Abandonment of property interests, like the existence of property interests, is a matter of state law. Both the trial court and the Wisconsin Supreme Court rejected the abandonment argument. Before the trial court, the petitioners urged that the terms "strike" and "quit" be equated in order to alleviate any constitutional duty on their part. The argument totally ignored the fact that the teachers' ability to walk away from their contract was no more unfettered than was the school board's. (A. 54, 55) Furthermore, as the trial court pointed out, under Wisconsin law a strike is a cessation of work but it does not constitute a termination of the employer-employee relationship; that results from discharge. (A. 187), citing *Marathon Electric Manufacturing Corp.* v. *Industrial Commission,* 269 Wis. 394, 69 N.W. 2d 573 (1955) and *Fredericks* v. *Industrial Commission,* 4 Wis. 2d 519, 91 N.W. 2d 93 (1958). The trial court also pointed out that if striking by itself constituted a severance of the employment relationship there would be no basis for injunctive relief on behalf of the employer, a remedy long recognized under Wisconsin law.[20]

The Wisconsin Supreme Court did not believe it was even necessary to go as far as the trial court did to reject the petitioners' abandonment argument. It held that the purpose of the due process hearing was to determine ini-

[20] Under Wisconsin law, a teacher cannot gain employment elsewhere unless the present contract is dissolved. §118.22(2), Wis. Stats. This statute would be rendered meaningless if the Board is correct. A teacher could simply engage in a "strike", thereby avoiding all contractual obligations, and then accept employment with another board.

tially whether each teacher did, in fact, engage in the strike as alleged prior to determining what penalty, if any, could reasonably be imposed under all the circumstances giving rise to that conduct if so proven. The argument that the right to a meaningful hearing had been abandoned by the very conduct which must be proved as an element of that hearing was dismissed as "circular reasoning". (A. 248), 66 Wis. 2d at 489, 225 N.W. 2d at 669.

C. The Property Interests Were Not Limited; Arnett v. Kennedy Is Not Applicable.

In addition to the argument that the teachers abandoned their property interests, petitioners suggest that the due process protections afforded to the teachers are limited by the statutory provisions giving rise to the property interests which call due process protections into play. The argument is based on *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), which the petitioners state "should be directly controlling". (Petition for Writ of Certiorari, p. 8). The *Arnett* argument is inconsistent with the abandonment argument in that the former necessarily requires a concession that the teachers do indeed have property interests while the latter denies their existence. The principal problem with the *Arnett* argument, however, is that it requires an interpretation of the statutes giving rise to the property interests and a conclusion that those same statutes legitimately limit the due process protections flowing therefrom. In this case, the property interests arise from both individual contracts and state statutes and, in addition, the Wisconsin Supreme Court in interpreting the statutes specifically held that they did not limit the due process rights of the citizens whose property interests evolved under the statutes. After examining the Wisconsin statu-

tory scheme in light of the *Arnett* argument advanced by the petitioners, the Wisconsin Supreme Court concluded:

> "The plurality [in *Arnett*] thus concluded that the extent of the property right was limited by the act itself, and hence due process was not required. There is no analogous situation here." (A. 254), 66 Wis. 2d at 495, 224 N.W. 2d at 672.

The United States Supreme Court was interpreting an act of Congress in *Arnett* and, consequently, had the final word on interpretation of the act's meaning. Similarly, in this case the Wisconsin Supreme Court was interpreting an act of the Wisconsin legislature and its interpretation must be accepted. *Groppi* v. *Wisconsin,* 400 U.S. 505, 507 (1971). Thus *Arnett* is not applicable at all.

Even if this Court believes there is some basis for reviewing the Wisconsin Supreme Court's interpretation of Wisconsin law in this respect, it is clear from an analysis of *Arnett* that that case has no application to the facts of the case at bar. Indeed, if *Arnett* were considered applicable to the facts of this case, such a conclusion would require an inferential overruling of both *Roth* and *Perry,* a result which is clearly unwarranted in view of this Court's express reliance on and differentiation of *Roth* and *Perry* in *Arnett.*

In *Arnett,* the United States Supreme Court was presented with the question of whether a public employee in the federal classified competitive civil service could be discharged without a pretermination hearing. The termination was accomplished under the Lloyd-LaFollette Act, 5 U.S.C., §7501, which provides an extremely detailed procedure for termination, including specific notice, an opportunity to respond, a post-suspension appeal proceeding which includes a completely *de novo* evidentiary trial with

respect to both facts and punishment before an independent decisionmaker, and a right to reinstatement with full back pay.

Three justices (Rehnquist, J., the Chief Justice and Stewart, J.) concluded that there was no requirement that a terminated employee in the civil service be provided with a full due process hearing prior to termination. That conclusion followed a detailed analysis of the history and applicability of the Lloyd-LaFollette Act. Justice Rehnquist, speaking for those three justices, pointed out that prior to the Lloyd-LaFollette Act there was no right to continuing employment and that civil service employees could be discharged at the whim of their superiors. Thus, the Lloyd-LaFollette Act created a limited property interest in continued employment by virtue of adding the requirement that discharge be for cause as defined in the Act. However, Justice Rehnquist also pointed out that the same act which gave rise to that limited property right also provided the method of protecting it. Because the property right granted was so limited, because it was granted by the same legislative act which described the method of protecting it, and because the review procedures were specifically defined by Congress to enforce the right it was granting, Justice Rehnquist stated that the Act did not violate the due process clause.

Justice Powell, with whom Justice Blackmun concurred, agreed that Mr. Kennedy's discharge did not contravene procedural due process requirements, but on other grounds. He concluded that the Lloyd-LaFollette Act could not limit the procedural due process requirements of the Constitution, but that it had not done so in that case. Since the detailed removal procedure under the Act allowed for a *de novo* evidentiary hearing on administrative appeal with

respect to both guilt and punishment, and reinstatement with back pay, he felt that the due process clause was satisfied.

Justice White also held that the Act could not limit the due process requisites of the Constitution. He believed that the pretermination hearing provided by the Act coupled with the full evidentiary hearing afterwards would be acceptable if the pretermination hearing were held before an impartial hearing officer. He construed the Act to require an impartial hearing officer.

Justice Marshall, with whom Justices Douglas and Brennan joined, held that despite the terms of the Act, due process required a full evidentiary hearing before an impartial decisionmaker on the facts of *Arnett*.

It is obvious that *Arnett* does not control the case presently before the Court in the sense which the petitioners urge. The only majority conclusions in *Arnett* are that a legislative act cannot limit the due process requirements of the Constitution and that the termination of Mr. Kennedy was not improper. There is no precedent in *Arnett* for the propositions sought to be asserted by the petitioners here. No more than three justices joined in any of the separate opinions.

It is also apparent that the circumstances of this case would not satisfy any of the opinions. Justice Rehnquist's opinion was based on the fact that:

> "[T]he very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution." 416 U.S. at 152.

Here, of course, we are not dealing with employees in the classified competitive civil service, but rather with members of a profession whose rights were outlined in *Roth* and *Perry*. Their expectation of continued employment, the property right, arises from §118.22(2), Wis. Stats., and that statute in no way limits the procedural protections of the property right granted therein. Indeed, nowhere do the Wisconsin statutes indicate that the property right granted is to be subjected to limited due process protection. Furthermore, the property interests also arise by contracts. The analogy attempted to be drawn to the Lloyd-LaFollette Act and, consequently, to Justice Rehnquists's opinion in the *Arnett* decision was rejected by the Wisconsin Supreme Court upon their interpretation of Wisconsin law.

Nor would Justice Powell's view allow *Arnett* to be applied here. There is no specific statutory procedure for review of terminations, much less one that guarantees a prompt, *de novo*, evidentiary trial-type hearing with the possible result of decreased penalty or reinstatement with back pay.[21]

Justice White's separate opinion would not appear to allow application of the *Arnett* case to the situation at bar. His view was that an independent and impartial hearing officer must be afforded prior to termination, and, because such was provided by the Lloyd-LaFollette Act, he found the Act acceptable. However, because the officer provided was not in fact independent and impartial he believed the procedure was in violation of the Constitution.

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[21] The decision of the Wisconsin Supreme Court provides the *de novo* review which was already in existence in the Lloyd-LaFollette Act. Perhaps *Arnett* would have been violated if the Wisconsin Supreme Court had not acted to save the Wisconsin law.

Justice Marshall's position was that a full hearing before an impartial decisionmaker was required prior to discharge in most cases. He also believed that at a minimum an independent decisionmaker was required in all cases.

The Wisconsin laws giving rise to the property interests in this case do not contain any specific procedural requirements concerning termination proceedings. Consequently none of those factors which the Justices deemed to be important in reaching the positions they took with respect to *Arnett* is found here.[22]

D. The Teachers Also Had Liberty Interests Entitling Them to Due Process.

Aside from property interests, a public employee is entitled to due process when his liberty is at stake as well. *Roth, supra,* at 573-574. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971). See also *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123 (1951).

On the facts of this case as presented to them, both the trial court and the Wisconsin Supreme Court had no difficulty finding that the teachers' liberty interests were at stake. The trial court, familiar with local community views at least to the same extent that the School Board members claim to be by virtue of their position as elected officials, found that charges of breaching individual employment contracts and engaging in an unlawful strike "do constitute charges that in all likelihood would diminish

[22] In *Goss* v. *Lopez,* 419 U.S. 565 (1975), the Court refused to extend *Arnett* beyond the realm of federal civil service.

the plaintiff teachers' prospective employment opportunities." (A. 191) The Wisconsin Supreme Court stated that "It is apparent that such charges could deterimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for reemployment."[23] (A. 249), 66 Wis. 2d at 490-491, 225 N.W. 2d at 669.

The conclusions of the trial and appellate courts are remarkably similar to this Court's conclusion on a similar issue in *Goss* v. *Lopez,* 419 U.S. 565 (1975). In speaking of charges allowing suspension of school students for up to ten days, the Court said:

> "If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." 419 U.S. at 574.

The petitioners suggest that the teachers have no real fear concerning the effect on their reputations because they have freely entered into litigation which publicizes their conduct. (Brief for Petitioners, p. 21 n. 4). Since it should be apparent to everyone that the teachers have little chance of vindicating their rights without litigation, the petitioners' argument is sophistic. It is like suggesting that Mrs. Constantineau waived her liberty claim by presenting it publicly to this Court. See *Wisconsin* v. *Constantineau, supra.* More importantly, however, it must

[23] The Wisconsin Supreme Court may have merely adopted the view of the petitioners in their brief to that court where they said at p. 25 that a school board could "rationally conclude that being on strike is inconsistent with being a good teacher." The petitioners thus agreed below that discharge for striking could constitute a condemnation of the teachers' abilities to teach.

again be noted that the penalty imposed for engaging in a prohibited strike, under Wisconsin law, must be reasonable under all the circumstances. Thus, if the teachers are publicly branded as individuals who have been terminated for striking, the presumption in the community is that their conduct in the labor dispute was so outrageous under the circumstances that the drastic penalty of discharge was reasonable. Due process is essential so that the teachers can present their side of the issue before any such significant branding is accomplished. *Roth, supra,* at 570-571.

E. One Element of the Process Due the Teachers is an Impartial Decisionmaker.

When the Wisconsin Supreme Court concluded that it was in agreement with the trial court that the teachers were entitled to due process it accurately stated that the next question emerging is "what process is due." (A. 249), 66 Wis. 2d at 491, 224 N.W. 2d at 669. There is no dispute between the parties that notice and an opportunity to be heard are required. The dispute has essentially always centered around whether an impartial decisionmaker is also required. The trial court, operating under the assumption urged by the petitioners that the only issue to be determined was whether or not the teachers had engaged in a strike, found that "the degree of impartiality which may have been required in other settings was not necessary to adjudicate the single fact involved in this case." (A. 197) In effect, the School Board did not claim to be impartial with respect to assessing its own conduct *vis a vis* that of the teachers in the relationship giving rise to the strike. It argued that the only issue to be decided was the existence of a strike.

The Wisconsin Supreme Court, however, reversed and vacated the trial court's grant of summary judgment specifically because of the error in that view. The Wisconsin Supreme Court pointed out that Wisconsin law requires more than a demonstration that the public employees engaged in a strike. It also requires that any penalty imposed be reasonable under all the underlying circumstances. (A. 252), 66 Wis. 2d at 493, 224 N.W. 2d at 671.

That was a re-statement of existing Wisconsin law. *Durkin* v. *Board of Police & Fire Comm.*, 48 Wis. 2d 112, 180 N.W. 2d 1 (1970). Since the underlying circumstances of the strike, as well as the existence of the strike itself, were important factual matters bearing on the ultimate decision, reasonableness of penalty, the Wisconsin Supreme Court held that this was a normal due process situation in which the traditional elements of due process are required, including an impartial decisionmaker. (A. 252), 66 Wis. 2d at 493, 224 N.W. 2d at 671.

The action was presented to the state courts on the basis of both state and federal due process requirements. Consequently, the decision was presumptively based on both state and federal due process provisions. The petitioners present their question as though the only issue is whether the federal due process clause requires a sufficiently impartial decisionmaker. While the respondents dispute that particular limitation on the statement of issues, it is submitted that the answer, in any event, is a resounding "yes".

> "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process'. *In re Murchison,* 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to Courts. *Gibson* v. *Berryhill,* 411 U.S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but

'our system of law has always endeavored to prevent even the probability of unfairness'. *Murchison, supra;* cf. *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927)." *Withrow* v. *Larkin,* 421 U.S. 35, 46-47 (1975).[24]

The question presented by the petitioners is whether the School Board, which is elected and has exclusive authority under state law to terminate teachers engaged in a prohibited strike, can be prohibited from doing so because its members are not sufficiently impartial. The facts before the Court show that the teachers are public employees, that they have property and liberty interests involved in the action challenged, that the School Board acts under color of state law, and, therefore that the teachers are entitled to due process of law. Since the issues involved encompass more than the mere existence of a strike, but also the reasonableness of any penalty to be imposed, past conduct and credibility of witnesses become relevant.[25] Thus, the traditional requirements of due process are applicable, including a sufficiently impartial decisionmaker. The decision of the Wisconsin Supreme Court which recognized that, whether based on interpretations of the Wisconsin or Federal Constitution, is unassailable.

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[24] *Groppi* v. *Leslie,* 404 U.S. 496 (1971) is cited on page 28 of the petitioners' brief for the proposition that there are situations in which an impartial decisionmaker is unnecessary. They do not point out that *Groppi* concerns summary contempts and that the independent decisionmaker issue was not raised there. Indeed, since *Groppi* was decided, this Court has ruled that even in summary contempt cases another judge must decide the contempt charges if the trial judge is personally provoked or embroiled in the controversy. *Taylor* v. *Hayes,* 418 U.S. 488 (1974).

[25] The trial court noted that the Board members would not be considered impartial if they had to evaluate credibility of witnesses. (A. 196)

IV.

THE WISCONSIN SUPREME COURT CORRECTLY HELD THAT THE SCHOOL BOARD WAS NOT SUFFICIENTLY IMPARTIAL TO SATISFY DUE PROCESS REQUIREMENTS.

The respondents originally brought this action in the state circuit court alleging that they were entitled to due process and that, for various reasons and in various respects, due process had not been afforded. Among the allegations made was a charge that due process had been denied in that the Board, which was sitting as a decisionmaker to impose a penalty for the conduct of the teachers, refused to consider any evidence or allow any testimony concerning its own conduct in the underlying dispute giving rise to the strike. (A. 136) The Board did not claim to be unbiased, but rather answered by alleging that proof sought to be introduced by the teachers concerning the Board's conduct, even if true, was immaterial and that there was no justification for the teachers' conduct. (A. 144) The petitioners also raised affirmative defenses of an avoidance nature, including an allegation that the teachers were not entitled to due process. (A. 147)

Summary judgment was granted the petitioners with respect to the due process claims by the circuit court. Although the court concluded that the teachers were entitled to due process of law, it accepted the petitioners' argument that there could be no defense to a strike, and, therefore, that the only issue to be determined in the due process hearing was the existence of a strike. (A. 196) The court, believing the sole issue to be whether or not the teachers engaged in a strike, and believing that that issue was not controverted, held that the type of impartiality necessary in other settings, such as "where it would be necessary for the decisionmaker to judge the credibility of witnesses and weigh the evidence", was not necessary here. (A. 196-

197) That, of course, was consistent with the position taken by the petitioners before the circuit court.

When the Wisconsin Supreme Court considered the respondents' appeal and reviewed the trial court's ruling, it pointed out that the issue to be decided was not simply the narrow one of whether a strike existed but also the question of what to do about the strikers. The Wisconsin Supreme Court recognized that circumstances in mitigation might dictate that discharge was not warranted. (A. 252), 66 Wis. 2d at 493, 225 N.W. 2d at 671. Consequently, the Wisconsin Supreme Court disagreed with the circuit court as to the extent of the need for an impartial decisionmaker.

In presenting its question to this Court, the Board again espouses the position taken before the lower courts, that is, that the situation is not one which requires a "sufficiently impartial decisionmaker". (Brief for Petitioners, p. 2). However, despite the petitioners' limitation of the issue below, and their manner of presentation of the question in the petition for certiorari, they argue in section V of their brief alternatively that they are not partial or that the respondents have not demonstrated bias.

A. The Respondents May Not Be Penalized On The Present State of the Record.

The latter argument, of course, is highly suspect in view of the status of this case. The petitioners were successful in a motion for summary judgment before the trial court, with the result that the respondents were unable to engage in any sort of trial at that level. When the Wisconsin Supreme Court vacated the summary judgment grant and ordered a meaningful hearing, the petitioners brought the action to this Court for further review. Consequently, the respondents have never had an opportunity to present evidence, beginning with the "hearing" in front of the

Board at which evidence of the Board members' conduct, which would necessarily go to bias as well as mitigation, was disallowed and an offer of proof was rejected.

An argument analogous to the one made by the petitioners here was rejected in *Groppi* v. *Wisconsin,* 400 U.S. 505 (1971). In that case, there was a challenge to a state statute that prohibited a change of venue despite the extent of local prejudice against the defendant in a misdemeanor case. With respect to an argument that the defendant had failed to demonstrate actual prejudice, the Court responded:

> "We reject the suggestion that the appellant is not in a position to attack the statute because he made an insufficient showing of community prejudice. His motion for a change of venue explicitly asked, in the alternative, that he be permitted to 'offer proof' of the nature and extent of the local prejudice against him. His motion was denied in its entirety, thus foreclosing any opportunity to produce evidence of a prejudiced community." 400 U.S. at 508 n. 5.

Here the School Board refused to allow testimony and rejected an offer of proof, all of which was intended to demonstrate the Board's conduct in the underlying dispute. The Board's prohibition foreclosed an opportunity for the teachers to produce evidence in mitigation which also would have tended to prove bias. Since, however, the Board was aware that the evidence sought to be presented by the teachers was critical of the Board members, the prohibition itself evidences bias.

B. The Question of Bias Was Properly Decided.

With respect to the petitioners' first argument, it is submitted that the issue of the petitioners' lack of sufficient impartiality, if properly before this Court, was correctly

decided by the Wisconsin Supreme Court. Since under Wisconsin law, as stated by the Wisconsin Supreme Court, discharge is not an automatic penalty for engaging in a prohibited strike and any penalty imposed must be reasonable under the circumstances, the Wisconsin Supreme Court observed that the situation presented was not unlike the situations involved in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

In *Morrissey,* which concerned parole revocations, it was pointed out that:

> "The parolee must have an opportunity to be heard and to show, if he can, that *circumstances in mitigation suggest that the violation does not warrant revocation.*" 408 U.S. at 488 (emphasis added).[26]

Since the circumstances in mitigation sought to be shown by the respondents here involve the conduct of the Board, it was obvious to the Wisconsin Supreme Court that fundamental fairness required a different decisionmaker.

As in *Goldberg* v. *Kelly,* it was not necessary for the Wisconsin Supreme Court to specifically impugn motives of the Board or find actual bias in order to recognize that fairness would not be achieved if the Board were to have

[26] The brief of the petitioners at p. 26 states that the only purpose of a parole revocation hearing is to determine whether parole should be revoked. That is an understatement. In mitigation of penalty the parolee can assert that his violations were due to unreasonable demands of his parole officer or that he misinterpreted his parole officer or that his parole officer excused prior misconduct. In the setting of parole revocation, the officer and the parolee are in enough of a conflict for this Court to require a different decisionmaker. Since, under Wisconsin law, the Board and the teachers had a similar conflict, the analogy made by the Wisconsin Supreme Court to *Morrissey* was appropriate. (A. 252), 66 Wis. 2d at 492, 225 N.W. 2d at 670.

the exclusive decision. The appearance of bias or the likelihood of bias is sufficient to disqualify a given decisionmaker.

The Court recently considered the issue in a case involving contempt citations issued against an attorney by a judge before whom the allegedly contemptuous conduct occurred. The Court specifically agreed with the state court whose judgment was being reviewed that the record did not disclose conduct that constituted such a personal attack upon the decisionmaker as to destroy the "calm detachment necessary for fair adjudication". *Taylor* v. *Hayes,* 418 U.S. 488, 501, (1974), citing *Mayberry* v. *Pennsylvania,* 400 U.S. 455, 465 (1971). Despite that conclusion, however, this Court still found the judge not to be a proper decisionmaker because he was too embroiled in the controversy.

> "In making this ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.' *Ungar* v. *Sarafite,* 376 U.S. 575, 588 (1964). 'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less. *In re Murchison,* 349 U.S. 133, 136 (1955)." 418 U.S. at 501.

C. The Facts Involved Support A Finding of An Unacceptably High Risk of Bias.

The decision of the Wisconsin Supreme Court allowing the Board to make an initial determination of penalty subject to *de novo* consideration by an impartial judicial officer at the teachers' request was not made without rea-

son. The record, even limited as it is in view of the procedural status of the case, supports the finding.

Although the notice stated that among the purposes to be determined at a hearing was the nature of disciplinary action to be taken by the Board (A. 19), and the Board's counsel, Mr. Ruhly, stated at the hearing that the Board "will consider what discipline, if any, is appropriate under the circumstances" (A. 69), the fact of the matter is that the Board really only had one punishment in mind from the beginning to the end of the proceedings and that penalty was discharge. On the first day of the strike, the Board publicly stated its options. (A. 112-115) The hearing was an implementation of option (d) which was to "send them a letter of termination and hire permanent replacements". Thus, there was no doubt, despite pretenses to the contrary, that the result would be termination.

The issue of whether the teachers had been on strike was never open to serious debate by the Board as is demonstrated by the following colloquy between counsel:

> "Mr. Ruhly: The Board did not go on strike. The Board did not cause closing of school for several weeks. We are here to see who did go on strike.
>
> Mr. Erlke: If you know who did, why are you asking us?
>
> Mr. Ruhly: I would like each teacher to tell us whether they have a statement to make to the Board before the Board determines what disciplinary action, if any, is appropriate." (A. 80)

This was so despite the assertion by counsel for the teachers that the teachers had been "locked out of their places of employment". (A. 95) In the Board's answer, they state that the only persons who were given notices for the hearing were "those individuals who engaged in the unlawful

strike activity". (A. 129) Petitioner Weihing's affidavit also indicates that it was only those teachers "who had been and [were] then engaged in the unlawful work stoppage" who were ordered to disciplinary hearings. (A. 152) Thus, the question as to whether there was a strike or not and whether it was lawful or not had already been determined by the Board prior to the hearing.

At the hearing before the Board, counsel for the teachers objected to the Board sitting as the decisionmaker and attempted to introduce evidence tending to show conduct on the part of Board members which was believed to have frustrated the collective bargaining effort. The receipt of evidence was prohibited and an offer of proof was rejected. (A. 96) The offer of proof made and rejected contained allegations concerning the Board's conduct, including the use of coercive tactics, failure to consider certain provisions, refusal to continue bargaining, failure to notify the union concerning action taken against employees, lost school time as a result of a lock-out rather than a strike, refusal to provide information necessary for bargaining, and other factors. (A. 94-95)

Since the beginning the teachers have charged that the petitioners utilized methods calculated to provoke a strike which would enable the petitioners to terminate all teachers and hire at random from the ranks in order to destroy the effectiveness of the union. (A. 123) In their petition for an original writ to the Wisconsin Supreme Court the teachers reiterated their allegations and also alleged that the Board of Education gave favorable treatment to teachers who had engaged in a strike but who were not represented by the Hortonville Education Association. (A. 224) The respondents believe that the real purpose for the hearing was to end the labor dispute through elim-

ination of the opposition. This conclusion emerges from the totality of circumstances and is certainly stated bluntly by counsel for the Board in the following exchange:

> "Mr. Ehlke: Why don't you bargain in agreement, Jim. By the time you have them served, the whole thing would be over with and you wouldn't have to be fooling around with it.
>
> Mr. Ruhly: Mr. Ehlke, *there are many ways to dissolve a labor dispute.*" (A. 98) (emphasis supplied.)

Obviously, the labor dispute would not be "dissolved" unless the striking teachers were fired. However, resolution of the labor dispute was not supposed to be the purpose of the hearing. It was a disciplinary hearing. Counsel for the petitioners asked to utilize the time for working on the labor dispute by way of bargaining and the Board refused. The Board's actual motives were poorly disguised.

The Wisconsin Supreme Court examined the allegations made and the factual background of the case and discovered "a situation not at all conducive to detachment and impartiality on the part of the School Board." (A. 252), 66 Wis. 2d at 493, 225 N.W. 2d at 671. The School Board was a party to contract negotiations with the teachers and those negotiations had broken down. The School Board publicly asserted that its position was fair and reasonable and that the position of the teachers was not. (A. 112) When the teachers engaged in a strike and the School Board was in a position to impose a penalty, it was in a position to take action which, although under the guise of reasonable punishment, would constitute an end to its labor problems.

> "The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop. We conclude that the Board was not an impartial decisionmaker in a constitutional sense and that the appellants were denied due process of law". (A. 253), 66 Wis. 2d at 494, 225 N.W. 2d at 671.

While perhaps it can be argued that the record was not sufficient, because of the procedural status of the case, for the Wisconsin Supreme Court to find unequivocally that the School Board was actually biased, the court would have had to have closed its eyes to ignore the probability of such bias. *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972).[27] This is not a case, as the petitioners suggest, where there is simply a mixing of functions, but rather one in which the party sitting in judgment is intimately involved with the conduct being judged. Such intimate involvement with the subject matter necessarily creates a real risk of bias. *Taylor* v. *Hayes,* 418 U.S. 488 (1974); *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968).

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[27] The *amicus* brief of the National School Boards Association at 13 attempts to distinguish the impact of *Ward* by arguing that there was no pecuniary self interest on the part of the Board and that there was no "evidence that discharging the teachers was necessary to the school district's financial interests". Later at 16 they argue that the combination of the functions of "budgeting, negotiating, adjudicating, hiring and firing", were not conflicting. Those two positions are inherently inconsistent. The economic conflict found by this Court in *Ward* is clearly present here, especially if the Board believed that their budgeting problems would be less difficult without these organized teachers. One of the demands which the Board listed as leading to the impasse in negotiations concerned class size. (A. 114) That is a working condition issue. If class sizes were reduced, education would probably improve. Thus, in this instance, the Board was economically at odds both with the teacher demands and quality education.

D. This Case Involves Much More Than A Mere Mixing Of Functions.

In *Withrow* v. *Larkin*, 421 U.S. 35 (1975), the Court considered the propriety of mixing functions and whether such mixing was consistent with due process. In that case, the Wisconsin Medical Examining Board had investigated charges against a doctor prior to sitting as judge of the charges. This Court held that there had been no demonstration that the prior investigation biased the Board as adjudicator. The Court stated that:

> "The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." 421 U.S. at 55.

Here, however, we are not talking about the Board mixing the functions of investigation and adjudication. Rather, we are talking about a mixture of *participation* and adjudication. In determining an appropriate penalty to be imposed, the decisionmaker was required to consider all the factors giving rise to the strike, which included consideration of its own conduct. The Board had publicly blamed the teachers and defended its own position with respect to the underlying circumstances, and it is obvious that the Board members were

> "so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position". 421 U.S. at 57.

The Board's initial view of the facts underlying the strike was not based on either a routine investigation or some other non-adversarial process. It derived from its own participation in the underlying dispute. As a consequence, the Board's initial view "as a practical or legal

matter foreclosed fair and effective consideration at a subsequent adversary hearing, leading to ultimate decision". 421 U.S. at 58. That fair consideration was foreclosed is demonstrated not only by a common sense assessment of the status of the parties but also by the Board's refusal to consider any evidence concerning its own conduct and the Board's decision to withdraw contracts for the upcoming school year, despite the fact that no notice was given suggesting that those contracts were threatened.

The record in this case clearly demonstrates that the situation before the Court presents the same due process deficiencies found fatal in *In re Murchison*, 349 U.S. 133 (1955), and described in *Withrow*. 421 U.S. at 53. *Murchison* involved a state law empowering a local judge to sit as a "one-man grand jury", to compel witnesses to testify in secret before him, to cite such witnesses with contempt for perjury or refusal to answer questions, and to try and convict those same people. This Court found several defects in the state procedure which constituted denials of due process.

> "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings. . . . Thus, the judge whom due process requires be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.
>
> ". . . '[A] judge-grand jury' might himself many times be a very material witness in a later trial for contempt. If the charge should be heard before that

judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant. In either event the state would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such a way." 349 U.S. at 138-139.

The analogy to the case at bar is very clear. Before teachers cen be disciplined for engaging in a strike, Wisconsin requires that they be afforded an opportunity to present their side of the story for defense and mitigation. The testimony to be offered in support of the teachers' side necessarily involves conduct engaged in by the negotiators for the school district, that is, the School Board. It would be "difficult, if not impossible" for the School Board members to examine the evidence objectively and free themselves from the influence of their recollection of what occurred between them and the teachers in the negotiating sessions and in other contexts in the past. The School Board members definitely would be required to call on their own personal knowledge and impressions of the history of the labor dispute. They are, in fact, material witnesses to any hearing necessary to determine reasonableness of penalty. Yet because they sat as the decisionmaker, the teachers were deprived of examining and cross-examining them. The alternative would have been the School Board presenting testimony upon which it would finally pass. So as long as the School Board occupied the role of decisionmaker, the state had the benefit of its knowledge while the teachers were denied an effective opportunity to cross-examine.

Although these factors in and of themselves were found to constitute a denial of due process in *Murchison,* the present situation is even more offensive. The problem with the judge sitting as a decisionmaker for the contempt hearings in *Murchison* was his prior exposure. Here, it is prior conduct, that is, participation in the very events which are material to a determination of the reasonableness of any penalty to be imposed, and participation in those events in an adversary relationship to the parties whose conduct in those events is the subject of the disciplinary proceedings. Thus, the procedure advanced by the petitioners and found defective by the Wisconsin Supreme Court is one significant step beyond the procedure in *Murchison.*

The Wisconsin Supreme Court, on the strength of Wisconsin law, examined and interpreted local circumstances arising under local law and had no difficulty finding a situation conducive to the probability of unfairness. Not only should that conclusion be respected because of the Wisconsin Court's understanding of the special facts and circumstances before it, but also because it is obviously an accurate conclusion.

V.

THE PUBLIC INTEREST IS BEST SERVED BY NOT DEVIATING FROM GENERALLY APPLICABLE DUE PROCESS REQUIREMENTS.

The petitioners and their *amici* present various policy arguments in urging a relaxation of generally acceptable due process standards. They argue that private enterprise is not required to comply with such constitutional responsibilities. They also suggest that due process is different in this situation because of the magnitude of the problem

presented. They are suggesting here that different due process requirements with respect to the independent decisionmaker should prevail when there are 88 people involved instead of one or two. Finally, the petitioners urge that due process is different when the governmental action is initiated by persons who are elected officials.

The decision of the Wisconsin Supreme Court demonstrates that applying generally applicable due process standards nicely accommodates competing governmental interests and is especially cognizant of the taxpayers of Wisconsin.

A. The Decision Below Does Not Deny The Electorate Its Policy Voice But Rather States A Fundamental Principle: That When Government Attempts To Interfere With The Liberty And Property Interests Of Its Citizens It Must Provide Due Process.

The petitioners argue that the School Board is responsible for managing the affairs of the school district, including the hiring and firing of teachers, "subject only to direct electoral control at the annual meeting and to the authority specifically vested in other district officers." (Brief for Petitioners, p. 14). From that point, they argue that the decision of the Wisconsin Supreme Court denies the district's electorate a voice in its own affairs.[28]

[28] The petitioners recognize at Part VI of their brief, pp. 29-31, that Wisconsin law allows other remedies such as the common law writ of certiorari or petition to the Wisconsin Employment Relations Commission. Thus, even the petitioners acknowledge that the decisions of school boards were subject to judicial review and remedy prior to the decision in this case and that such judicial review did not destroy the control of the affairs of the school district by the electorate.

The entire argument is sophistry. Discharge is not an automatic penalty for striking under Wisconsin law. The penalty must be reasonable. School boards are required to bargain in good faith under Wisconsin law. §111.70(3)(a)(4), Wis. Stats. In the situation presented, the teachers were fired by the School Board, whom, the teachers allege, has not bargained in good faith, and, as the teachers further allege, has been attempting to destroy the teachers' union. Such conduct is not recognized as legitimate by Wisconsin law, whether the party engaging in it is said to represent the electorate or not. It is the function of the due process provisions of both the state and federal constitutions to allow a fair and meaningful hearing to determine whether a government agency is in fact making its decision because of the acceptable motives it claims or, rather, for the unacceptable reasons alleged by the parties affected by those decisions.

The Board's rather pious policy argument concerning its responsibility to the electorate is essentially nothing more than a smoke screen. There is nothing magic about the fact that School Board members are elected. The Wisconsin Legislature could, and in some circumstances has, directed that those members be appointed. *State ex rel. Board of Education* v. *Racine*, 205 Wis. 389, 393, 236 N.W. 553. In either event, the Constitutions of the state and federal government take precedence over political concerns, and, therefore, conduct engaged in by public officials must be constitutionally antiseptic and must follow the applicable law whether those officials are elected, appointed or acquire office in any other way. There is nothing novel about the application of procedural due process safeguards to conduct engaged in by elected public officials, as

opposed to other officials. See, e.g., *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972), and *Brown* v. *Board of Education,* 349 U.S. 294 (1955). Nor is there anything significant about the status of a school board:

> " 'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures . . . Boards of Education not excepted.' *West Virginia* v. *Barnette,* 319 U.S. 624, 637, (1943)." *Goss* v. *Lopez,* 419 U.S. 565, 574 (1975).

B. Nothing In The Ruling Of The Wisconsin Supreme Court Inhibits The Legislative Granting Of Rights.

On pages 21 and 22 of their brief, the petitioners make perhaps the most curious argument in their entire presentation. That argument, perhaps as much as anything else in the record, indicates the total lack of sensitivity for constitutional rights which exists among the petitioners.

The petitioners recognize that property rights are created by state law. Both the trial court and the Wisconsin Supreme Court in this case, interpreting state law, found that the respondents did have property rights entitling them to due process. Consequently, according to the Wisconsin Supreme Court, which was considering both the state and federal due process requirements, the respondents were entitled to an impartial decisionmaker.

The petitioners urge that this result encourages the Legislature to refrain from granting property rights. Stripped to its essentials, the argument is that the Legislature would not grant property rights giving rise to due process protections if it really thought that due process would thereby be required. While that is probably an accurate statement of the petitioners' views concerning the way government should treat its citizens and employees, it is insulting to the legislators of Wisconsin.

C. The Wisconsin Supreme Court Decision Does Not Make Public Employee Strikers Better Protected Than Private Sector Strikers. In Reality, the Decision Protects The Taxpayers of Wisconsin.

There is no dispute that public employee strikes are presently prohibited in Wisconsin.[29] Petitioners urge that the decision of the Wisconsin Supreme Court encourages public employees to strike thereby defeating the policy enunciated by the Legislature. In point of fact, however, the decision of the Wisconsin Supreme Court does nothing of the sort.

Nothing in the Wisconsin Supreme Court's opinion authorizes strikes prohibited by the Legislature. Nothing in the Wisconsin Supreme Court's holding says that public employees may not be discharged for engaging in a prohibited strike. What the Wisconsin Supreme Court's opinion does do is reiterate existing Wisconsin law on the proposition that *any* penalty for engaging in a prohibited strike must be reasonable under all the circumstances.

In most situations, the state or local agency responsible for determining the appropriate penalty, if any, to be imposed is not the agency whose own conduct is inextricably intertwined in the underlying circumstances giving rise to the strike, the circumstances upon which appropriateness is to be judged. Since this case did present such a situation, the Wisconsin Supreme Court simply held that an adversary's imposition of penalty was subject to *de novo* review by an unbiased decisionmaker. Such a decision does not encourage striking, it encourages good faith collective bargaining.

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[29] Legislation is presently pending which could remove teachers and other non-essential public employees from the ban. Bill AB-605.

The argument that public employees are better protected than private employees ignores the essential differences between the two situations.[30] The employer here is the government. The employees have property and liberty interests. When the government proposes to take action which is designed to interfere with those interests, due process of law is required. Such is not the case in private employment situations. Correlative situations exist in many areas of the law and there is nothing unusual about the fact that an individual's rights are different when a person or group of persons taking action concerning him act under a badge of official authority.

There is a major difference in structure between the public and private sectors in addition to the nature of the employer. The investors in the private sector are persons who voluntarily purchase an interest in the private enterprise. This constitutes risk money on their part and one of the risks that they take is that the management of the company will lose a lot of money due to improper handling of a labor dispute. Such investors have voluntarily risked their money for both gain and loss.

This is not true in the public sector. While all citizens have an interest in the government whether or not they are taxpayers, ultimately, the financial risk of mismanagement of a labor dispute is borne by taxpayers. These people are in a sense involuntary investors in the system. They are certainly not comparable to investors in the private sector.

[30] The Board's argument here is also curious. In a related case, another court ordered preferential rehiring of these teachers. The Board appealed that decision after obtaining a stay. This case is mentioned in the concurring opinion of Justice Robert Hansen. The Board is really seeking the best of both worlds. Their refusal to be forced to rehire *all* teachers, rather than picking and choosing, is further evidence for a trial of their true desire to destroy the union and its leaders.

Under Wisconsin law, the Wisconsin Employment Relations Commission (WERC) is given the same powers to order reinstatement of employees with back pay in both the public and the private sectors. Section 111.70(4)(a), Wis. Stats., states:

> "Prevention of prohibited practices. Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term 'unfair labor practices' appears in s. 111.07 the term 'prohibited practices' shall be substituted."

The petitioners and their *amici* all acknowledge the possibility of a subsequent right to attempt to recover by litigation for breach of contract, litigation before the WERC, or writ of certiorari.[31] The objection that they bring to this Court is the requirement imposed by the Wisconsin Supreme Court that allows the teachers to obtain prompt *de novo* review of a decision by a Board to dis-

[31] Again the petitioners' positions are conflicting and difficult to understand. If the petitioners believe that these other procedures provide identical judicial review as the one created by the Wisconsin Supreme Court, then their complaint has no substance because it only concerns the timing of judicial review. If, on the other hand, they concede that the new hearing is truly *de novo*, as required by Wisconsin law, then not only are the other forms of review inadequate, but the need for a different decisionmaker is clearly demonstrated.

charge striking teachers. The petitioners want a later hearing, rather than a prompt hearing.[32]

The petitioners and their amici would risk the taxpayers' money by protracted litigation. If they are wrong in their assessments of their own activities, school districts face possible heavy financial penalties. The decision of the Wisconsin Supreme Court protects the taxpayers when it applies generally applicable due process procedures. By compelling a prompt review in court, the financial exposure of the taxpayers of the district is diminished substantially. If the Board is determined to be wrong in its decision to discharge, then prompt reinstatement will be accomplished and little or no back pay will be ordered because of the timeliness of the hearing.[33]

There is thus no good reason advanced for altering generally applicable due process requirements. The public nature of the matter, the high cost to involuntary taxpayers in the event of a miscalculation by the Board, and the number of persons involved in the dispute all demonstrate the need for a prompt hearing rather than a hearing after damages have expanded the taxpayers' exposure to an unbearable amount. The Wisconsin Supreme Court, by this opinion, has made sure that no other school board will jeopardize its taxpayers again in such a fashion.

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[32] The constitutional requirement, of course, if a hearing is to be meaningful, is that it be *before* a protected interest is terminated. *Board of Regents* v. *Roth*, 408 U.S. 564, 569-70 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471, 476 n. 1 (1972); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Snaidach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 168 (1951).

[33] In this case, several attempts were made by taxpayers' groups to intervene to reduce the taxpayers' exposure.

CONCLUSION

Sprinkled throughout the brief of the petitioners and their *amici* is the suggestion that the Board always acts in the interests of quality education for its citizens. The innuendo is that somehow the teachers could care less about education. Members of the Boards are part-time persons who earn next to nothing. Brief of Wisconsin Association of School Boards, Inc., as *amicus curiae*, p. 9. The teachers are professionals who are licensed, college graduates. They are devoting their entire lives to education. Some of these Board members were taught by some of these teachers. To even suggest that the teachers are disinterested in education is an affront which demonstrates the myopia of the petitioners in this labor dispute.

Wisconsin has had a long history of innovative responses to promoting industrial peace. The Wisconsin Employment Peace Act was enacted in 1939 and this law was emulated by other states. "Wisconsin led the states when, in 1959, the Legislature gave municipal employees, including elementary and high school teachers, the right to organize and bargain collectively with their employers." Feinsinger and Roe, "Teacher Collective Negotiations," as printed in *A Candid Discussion of Issues in Education*, commissioned by Wisconsin Department of Public Instruction (1975), Ch. 9, at 129. Wisconsin was the first state in the country to legislatively allow collective bargaining by public employees. *Id.* at 130.

When the Wisconsin Supreme Court made its decision with respect to the Hortonville teachers, it was not writing in a vacuum with respect to collective bargaining experience. Being a part of a state which was an innovator legislatively in this area, the Supreme Court of Wisconsin throughout the last 35 years has been faced with sub-

stantial litigation implementing and harmonizing various state policy judgments. The *Hortonville* decision is but another example of the Wisconsin experiment in promoting industrial peace and more recently in promoting peaceful resolution of municipal labor disputes. The delicate balance as achieved through decades of experience in Wisconsin should not be upset.

The respondents respectfully request that this Court affirm the judgment of the Wisconsin Supreme Court involved in this writ of certiorari.

Respectfully submitted,

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